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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 697

JOSEPH D'AGOSTINO, Claimant of One 1957 Lincoln Premiere Two-Door Hardtop Coupe, Motor No. 57WA-5592L, its tools and appurtenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, Joseph D'Agostino, claimant of one 1957 Lincoln Premiere automobile, respectfully petitions for certiorari directed to the United States Court of Appeals for the Ninth Circuit of the United States of America and as grounds therefor sets forth as follows:

Jurisdiction.

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court of November 13, 1958 [Vol. III, pp. 2-3, Record]. The petition for certiorari is filed within 90 days of the said affirmation of the judgment by the United States Court of Appeals. Jurisdiction is granted pursuant to Title 28, Section 1254(1).

Opinion Below.

The opinion has not yet been published but is appended to this petition.

Statutes Involved.

Title 26, United States Code:

"Section 4401. Imposition of tax.

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

"(b) Amount of Wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 525."

Title 26, United States Code:

"Section 4411. Imposition of tax.

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. August 16, 1954, 9:45 a.m., c. 736, 68A Stat. 527."

"Title 26, Section 4412. Registration.

"(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

"(1) his name and place of residence;

"(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

"(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

"(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

"(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

"Title 26, U. S. C., Section 7302. Property used in violation of internal revenue laws.

"It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title

18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws. Aug. 16, 1954, 9:45 a.m., E.D.T. c. 736, 68A Stat. 867."

Statement of the Case.

The appellant's brother, Sam D'Agostino, was arrested in California on suspicion of bookmaking. The appellant telephoned one of the city police officers asking if he could get the "owe" sheets, and the officer arranged to meet the appellant at a gasoline station at Fremont and Main Streets in Alhambra. [R. T. 7]. There he told the appellant he could not have the "owe" sheets but could make a copy of them. The appellant then made a copy of the sheets. He had driven over to meet the officer in the Lincoln automobile that was seized. There was no warrant of seizure. Appellant denied that he was a bookmaker and there is no evidence that he took any bets or made any bets in the car. The seizure was based solely on a conversation with appellant in his automobile in which appellant had stated that he had settled one of his accounts at the fights. A tape recording taken at the police station, was offered in evidence as an admission against interest that the defendant had been engaged in bookmaking and that he used his automobile to carry him-

self about. The defendant denied that he had been engaged in the bookmaking activity at the time of the arrest of his brother on February 28 [R. T. 39], and he denied that he used his Lincoln to go around weekly on Mondays to his bettors [39-40]. The government called the petitioner under Rule 43(b) [R. T. 38]. The tape recording was introduced for impeachment of the petitioner.

Questions Presented by This Petition.

1. Whether a forfeiture is authorized or permitted under the facts of this case and whether the evidence is sufficient to support the findings and judgment of the trial court.

2. Whether the findings and judgment are contrary to the law and the evidence.

3. Whether evidence introduced for impeachment purposes may be used as a basis for a forfeiture.

4. Whether the occupational taxes, such as Section 7301 of the Internal Revenue Code, was meant to provide for forfeiture under the general taxing statute, Sections 7301 and 7302, Title 26.

Reasons Why the Writ Should Be Granted.

The writ should be granted because the United States Court of Appeals for the Ninth Circuit has decided this case contrary to the decision of this Court by analogy in *United States v. Lane Motor Co.*, 344 U. S. 630, and the lack of any congressional intent to forfeit automobiles for violation and non-payment of an occupational tax.

The case raises an important point of forfeiture not decided in accordance with expressed Congressional views and this Court's views on forfeiture.

We believe that the judgment in this case ought to be reversed on the authority of *United States v. Lane Motor Co.* (1953), 344 U. S. 630. There a claimant of an automobile used his car to commute to the site of an illegal still.

The cases are legion where Congress has authorized forfeitures in connection with liquor law violations, yet this Court held that the traveling of a purported owner of an illegal distillery to and from his still did not authorize the forfeiture of his vehicle. This decision was handed down in 1953. Congress passed the Revenue Act of 1954 thereafter and it would appear that it approved that decision.

Forfeitures are not favored in the law.

United States v. One 1936 Model Ford V-8 Deluxe Coach, 307 U. S. 219, 226, 83 L. Ed. 1249.

If Congress had intended forfeitures to exist under occupational tax laws, it would have so stated, for there are many statutes which provide for forfeitures specifically. (See Chap. 35, Sec. 4401, Internal Rev. Code 1954, Secs. 5650, 5661, 5671, 5681.) Congress has also passed Title 49, Section 781, United States Code, making automobiles forfeitable in the use and transportation or facilitation and transportation of narcotics, firearms, and counterfeit money. Nowhere has Congress made an automobile subject to forfeiture because it is driven in connection with an unpaid occupational tax. Before an automobile is subject to forfeiture for violation of an occupational tax, Congress should say so.

Farmers and M. Nat'l Bank v. Deering, 91 U. S. 29, 33, 35, 23 L. Ed. 196, 198-199.

For which reasons petitioner prays that writ of certiorari be granted directed to the United States Court of Appeals for the Ninth Circuit and that the judgment below be reversed and the car ordered returned.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

APPENDIX "A."

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Ninth Circuit.

Joseph D'Agostino, Claimant, of One 1957 Lincoln Premiere Two-Door Hardtop Coupe, Motor No. 57WA-5592L, its tools and appurtenances, Appellant, vs. United States of America, Appellee. No. 15,722.

Filed: Nov. 13, 1958.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: CHAMBERS, BARNES and HAMLEY, Circuit Judges.

BARNES, Circuit Judge:

A libel was filed in the district court alleging the seizure of claimant's 1957 Lincoln automobile on February 28, 1957, from Joseph D'Agostino, because said automobile "had been used by said Joseph D'Agnostino in receiving wagers without filing an application for a wagering permit, and without payment of wagering occupational tax, with intent to defraud the United States of the said taxes," in violation of Int. Rev. Code of 1954, §§4411, 4412;[1] and that the said automobile was subject to seizure and for-

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[1]26 U. S. C. §4411 reads: "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

26 U. S. C. §4412 reads: *"Registration. (a) Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and

feiture pursuant to the provisions of Int. Rev. Code of 1954, §7302.[2]

The district court made findings, ordered a judgment of forfeiture, and appeal is properly and timely taken in this Court.

Appellant urges two grounds for appeal: (1) that the evidence is insufficient to support the findings and judgment, and that the judgment is contrary to the law and the evidence; (2) that "Sec. 7301, of the Internal Revenue Act of (1924)" (sic) was unconstitutionally construed in applying it to the facts of this case.

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the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter."

[2]26 U. S. C. §7302 reads: *"Property used in violation of internal revenue laws.* It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws."

I—Facts

It was stipulated that appellant D'Agostino was the registered owner of the Lincoln automobile and that he was not possessed of a federal wagering tax stamp.[3]

On February 27, 1957, Sam D'Agostino, brother of claimant below, was arrested on certain premises in Alhambra, California, charged with suspicion of bookmaking. (He was later convicted of bookmaking.) These premises consisted of a private apartment rented by claimant, with the telephone listed in his name. While police officers were on said premises, Joe D'Agostino called by telephone, and when told of Sam's arrest, made an appointment with an arresting police officer to meet him (Joe) at a nearby service station. There Joe allegedly admitted to the police officer it was his (Joe's) book, and that he (Joe) was interested in getting a copy of the betting markers or sheets so that he would not be faced with "false" claims of bettors who had in fact laid no bets. Joe gave the police officer $100 and arranged to meet him the next day, February 28, 1957, at another service station. Both on the 27th and the 28th, Joe D'Agostino drove to the appointed places in the libeled automobile. On the 28th the claimant copied the betting markers or sheets supplied to him for that purpose by the police officer. He did this in the police car. The claimant "copied both the owe-sheets (of a prior business day) and the betting markers."

On the government's case in chief, an officer testified that at the police station where claimant was questioned respecting his previous payment of $100 to the officer,

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[3]Required by Int. Rev. Code of 1954, §4411, for those engaged in the wagering business.

claimant had told the police he had used the libeled Lincoln automobile to make weekly visits to his bettors so that he could either pay or collect the amounts lost or won. On February 28, 1957, when Joe D'Agostino was arrested, he was seated in the libeled Lincoln car, and had "betting markers" on him. *i.e.*, what he had copied from the sheets and markers seized by the police from his apartment. No other betting markers were found on claimant, nor in the automobile.

At the hearing of the libel, Joe D'Agostino flatly denied that he used the Lincoln car to receive wagers; denied he was interested in his brother Sam's bookmaking; stated that he tried to get the sheets only to help his brother and thus prevent false claims being made against him; that while he (Joe) had previously engaged in bookmaking, he had not been so engaged for two and one-half years.

On rebuttal, evidence of alleged conversations with Joe D'Agostino were related by a police officer in which claimant allegedly admitted he was running several bookmaking spots, including the one operated by Sam D'Agostino in Alhambra.

There was then offered and received in evidence a tape recording of an interview between police officers and claimant in the police building on February 28, 1957. The proper foundation was laid for its introduction. In the recording (Gov. Ex. 1), Joe D'Agostino stated flatly: "I'm a bookmaker"; stated that the apartment where his brother was arrested was his (Joe's); the telephone was his; and "the book" was his ("Of course, yes. The book was mine. I lied . . . . [when] . . . . I told him I wasn't booking. I said, 'I'm not booking. I lied to him

too.'") The claimant told in detail how he ran his bookmaking business and how he made use of the Lincoln car in it.[4]

II—Law

The trier of fact concluded that the evidence before him was sufficient to establish that the claimant used the libeled Lincoln car to violate the provisions of the Internal Revenue laws. We agree.

An action of this type is civil in nature. The government has the burden of proving the material allegations of the libel but not beyond a reasonable doubt. Anderson v. United States, 5 Cir. 1950, 185 F. 2d 343. Facts justifying forfeiture need be established only by a preponderance of the evidence. United States v. One 1955 Mercury Sedan, 4 Cir. 1957, 242 F. 2d 429, and cases cited therein. Extra-judicial admissions of the owner established the fact that the car was used in violation of the Internal Revenue laws. Since the action was, in effect, against the owner of the car as well as the car itself, the owner's admissions

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[4] "Q. I see. In other words, then you take your car and you go around to each one of your bettors on a weekly basis?
A. On a weekly basis.
Q. On Mondays?
A. Yah, Mondays and Tuesdays.
Q. You have to make one trip a week in your car to all your bettors to—
A. I'll—
Q. BY SGT. DOLE: That's where you've been going when we've been following you whenever you've been driving that Lincoln, huh?
A. (*) I didn't know you were following (*).
Q. BY SGT. LIEVAN: Put it another way, if we had been following you on Mondays, we'd have seen you go to all your bettors; right?
A. That's right. Monday and Tuesday, with the exception—I'll be honest with you, with the exception of Thursday night, I straighten up one account down at the fights. He's got four or five customers." [Tr. pp. 104-105.]

against interest justify a conclusion that the car was being used unlawfully. See Ted's Motors v. United States, 8 Cir. 1954, 217 F. 2d 777. Judgments of forfeiture have previously been ordered on mere circumstantial evidence. United States v. One 1955 Mercury Sedan, *supra*. What we have here is far more substantial.

Appellant urges that the recorded statements of D'Agostino were rebuttal and could not prove the material charges of the libel. We disagree. If the rebuttal goes, not to a collateral issue, but to the very heart of the case, and if it was believed by the trial judge, it is sufficient to establish and satisfy the necessary burden of proof resting on the government that claimant used the automobile—not *in* which to receive bets, but in which to *transport* the law violator and his gambling records. It was a greater use than merely using an automobile to commute to the site of illegal business operations. In this respect it differs from United States v. Lane Motor Co., 1953, 344 U. S. 630—the only case cited by appellant on this point.

In United States v. One 1953 Oldsmobile Sedan, W. D. Ark., 1955, 132 F. Supp. 14, the court ordered forfeiture. There the automobile was used only to keep the bookmaker in contact with the bettors and enable him to pay or collect at different places. There was no proof that the automobile was used to transport betting paraphernalia.

That §7302 of the Internal Revenue Code is applicable here, is the holding in United States v. General Motors Acceptance Corp., 5 Cir. 1956, 239 F. 2d 102, citing United States v. One 1952 Lincoln Sedan, 5 Cir. 1954, 213 F. 2d 786; Jarrett v. United States, 4 Cir. 1950, 184 F. 2d 532; United States v. Ganey, 5 Cir. 1950, 183 F. 2d 273; One Ford Tudor Automobile, etc. v. United States, 5 Cir.

1947, 164 F. 2d 1020. *Cf.* United States v. Jones, 5 Cir. 1952, 194 F. 2d 283.

The suggestion that §7302 (not §7301 as appellant urges) is unconstitutional or unconstitutionally applied has no merit. This section and similar sections under prior laws was intended to aid in the enforcement of revenue laws by providing for such forfeitures. United States v. One 1950 Ford Half-Ton Pickup Truck, 6 Cir. 1952, 195 F. 2d 857. The occupational tax on those accepting wagers or engaging in the wagering business is a valid exercise of the federal taxing power. United States v. Kahriger, 1953, 345 U. S. 22; De La Maza v. United States, 9 Cir. 1954, 215 F. 2d 138. Under the Constitution, art. I, §8, the Congress has the power to lay and collect taxes, and to make all laws necessary and proper for carrying into execution this power. It is not for us to say that §7302 is not such a law, absent some showing by appellant that such is the case.

The judgment of forfeiture is *affirmed.*

(Endorsed:) Opinion. Filed Nov. 13, 1958.

Paul P. O'Brien, Clerk.